Supreme Court, U.S.
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No. 98-1433

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1998

CHILDREN OF THE ROSARY, KATHERINE SABELKO, AND ARIZONA CIVIL LIBERTIES UNION,
*Petitioners,*
v.
THE CITY OF PHOENIX, *et al.*,
*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## BRIEF FOR THE RESPONDENTS IN OPPOSITION

RODERICK G. MCDOUGALL
City Attorney

MICHAEL D. HOUSE
Chief Counsel
Office of the City Attorney
200 West Washington Street
Phoenix, AZ 85003

DAVID A. STRAUSS *
Special Assistant City Attorney
1111 East 60th Street
Chicago, IL 60637
(773) 702-9601

DONALD O. LOEB
CAMPANA, VIEH, SHORE, OWENS & LOEB, P.C.
4422 N. Civic Center Plaza
Suite 101
Scottsdale, AZ 85251
(602) 707-5000

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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## QUESTION PRESENTED

Whether the First Amendment prohibits the City of Phoenix from adopting a policy under which it will sell advertising space on the outside of city-owned public transit vehicles only for messages that propose a commercial transaction.

## PARTIES TO THE PROCEEDING

Under Rule 35.3 of the Rules of this Court, the parties to the proceeding identified in the petition for a writ of certiorari should be corrected in the following respects: Richard Thomas is no longer Public Transit Director for the City of Phoenix. Neal Manske is now Interim Transit Director for the City of Phoenix.

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## BRIEF FOR THE RESPONDENTS IN OPPOSITION

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### STATEMENT

1. The City of Phoenix sells advertising space on the outside of city buses "for the purpose of raising revenue." Pet. App. 2a. The City has explicit standards limiting the kinds of advertising that it will accept. For example, the City refuses to accept advertising that "[r]elates to an illegal activity" or that "[i]ncludes language which is obscene, vulgar, profane or scatological" (*id.* at 78a-79a, 80a). Before November 1, 1996, paragraph 5.4(b)(5) of the City's advertising standards also excluded advertising that "[s]upports or opposes a candidate, issue or cause, or * * * advocates or opposes a religion, denomination, religious creed, tenet or belief." Pet. App. 79a; see *id.* at 2a.

While this standard was in effect, petitioner Children of the Rosary (COR) submitted an advertisement that contained the COR logo—described by the court of appeals as "a fetus surrounded by a rosary, which is connected to a cross at the top" (Pet. App. 2a)—and the words "Before I formed you in the womb, I knew you'—God" followed by the legends "Jeremiah 1:5," "CHOOSE LIFE!," and COR's logo and name. *Ibid.* When the City rejected this proposed advertisement, COR sued and obtained an injunction requiring the City to display the advertisement. *Ibid.*

On November 1, 1996, the City modified its advertising standards. The new standards deleted the restriction previously contained in paragraph 5.4(b)(5). The new standards instead stated: "The subject matter of bus advertising shall be limited to speech which proposes a commercial transaction." Pet. App. 80a; see *id.* at 3a. In response to the new policy, COR submitted an advertisement containing the same text as the earlier advertisement, but this time inserting the words: "Purchase this message as a bumpersticker for your vehicle" and giving a telephone number. *Id.* at 3a. Petitioner Arizona Civil Liberties Union also submitted an advertisement, stating: "The ACLU Supports Free Speech for Everyone" and adding: "To purchase this bumper sticker please call 602-650-1967" (*id.* at 63a, 3a).

2. The City rejected both advertisements on the ground that they did not comply with the new standard. Petitioners then brought this suit in the United States District Court for the District of Arizona, alleging that the City's action violated the First Amendment. The district court denied petitioners' motion for a preliminary injunction. Pet. App. 28a-74a. The district court ruled, among other things, that "the advertising panels on the sides of City buses constitute a nonpublic forum"; that the City's ad-

vertising policy "is both reasonable and viewpoint-neutral"; that "the Policy is neither facially vague nor vague as applied with respect to the advertisements submitted by [petitioners] and rejected by the City"; and that "the Policy has not been rendered vague as applied due to selective interpretation and enforcement." *Id.* at 73a-74a.

3. a. The court of appeals, in an opinion by Justice White, sitting by designation, affirmed. Pet. App. 1a-23a. The court of appeals first concluded, as had the district court, that the advertising spaces on the outside of City buses constitute a "nonpublic forum" under this Court's decisions. *Id.* at 6a-11a. In particular, the court of appeals rejected petitioners' contention that the advertising spaces are a "designated public forum." The court of appeals explained that "[t]he creation of a designated public forum requires a decision 'intentionally opening a nontraditional forum for public discourse'" (*id.* at 6a, quoting *Cornelius v. NAACP Legal Defense and Education Fund, Inc.*, 473 U.S. 788, 802 (1985)). The court of appeals concluded that "a review of the city's standards and practices indicates that the city has not opened a public forum." Pet. App. 6a. In particular, the court noted, "[t]he city has consistently restricted political and religious advertising." *Ibid.*

The court of appeals further reasoned that this Court's decision in *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974), "strongly supports our conclusion that the advertising panels are nonpublic fora." Pet. App. 7a. The court of appeals noted that the plurality opinion in *Lehman* "squarely rejected the argument that the advertising space on buses constituted a public forum protected by the First Amendment." *Ibid.*, citing *Lehman*, 418 U.S. at 301-02. The court of appeals then rejected petitioners' arguments that *Lehman* should be read to apply only to the interior of buses (Pet. App. 7a-8a & n.2) and that

*Lehman* had been discredited by subsequent cases (Pet. App. 8a-9a). In fact, the court of appeals noted, this Court "relied upon and reaffirmed *Lehman*'s rationale in *Perry* [*Education Association v. Perry Local Educators Association*, 460 U.S. 37 (1983)] and subsequent cases, and there is no suggestion in the Court's jurisprudence that the advertising panels are properly classified as designated fora." Pet. App. 8a-9a (italics added). The court of appeals also considered, and rejected, petitioners' argument that its conclusion was inconsistent with the holdings of other courts of appeals. *Id.* at 9a-11a.

b. The court of appeals stated that in a nonpublic forum, the government may " 'make distinctions in access on the basis of subject matter and speaker identity' " (Pet. App. 11a, quoting *Perry*, 460 U.S. at 49), so long as the distinctions " 'are reasonable in light of the purpose which the forum at issue serves' " (Pet. App. 11a, quoting *Perry*, 460 U.S. at 49) and do not discriminate on the basis of the speaker's viewpoint. Pet. App. 11a.

The court of appeals first addressed the question whether the City's reasons for limiting advertisements on buses were sufficient. Again agreeing with the district court, the court of appeals ruled that at least three of the interests advanced by the City were sufficient: the interest in "maintaining a position of neutrality on political and religious issues"; the concern that "buses and passengers could be subject to violence if advertising is not restricted"; and the need to "prevent[] a reduction in income earned from selling advertising space because commercial advertisers would be dissuaded 'from using the same forum commonly used by those wishing to communicate primarily political or religious messages' " (Pet. App. 11a-12a (quoting Answer ¶ 6.10)). The court of appeals stated that the "interests in protecting revenue and maintaining neutrality on political and religious issues

are especially strong" (Pet. App. 12a) and had indeed been approved in both *Lehman* and *Cornelius v. NAACP Legal Defense and Education Fund, Inc., supra* (*id.* at 12a-13a, citing *Lehman*, 418 U.S. at 304, and *Cornelius*, 473 U.S. at 809). The court of appeals accordingly concluded that the City's policy "is reasonable in light of the interests asserted" (Pet. App. 13a).

The court of appeals then rejected petitioners' argument that the City had discriminated on the basis of viewpoint. Pet. App. 14a-20a. The court first considered petitioners' argument that the policy was somehow rendered invalid by the City's statement that the policy was intended to exclude religious and political speech. The court of appeals explained that there is nothing improper about an intent to exclude speech with a certain content from a nonpublic forum so long as the City was not discriminating against particular viewpoints (*id.* at 14a-15a) and so long as the exclusions were reasonable, "which is the case here[: t]wo of the reasonable exclusions are political and religious speakers in order to maintain neutrality." *Id.* at 14a.

The court then specifically affirmed the district court's findings that the City, in administering the policy, had not discriminated on the basis of viewpoint. Pet. App. 16a. The court explained that "[a]lthough the city has continued to honor pre-existing contracts involving noncommercial advertisements to avoid breach of contract claims * * * the city has not accepted new noncommercial advertisement." *Ibid.* The court of appeals concluded (*ibid.*):

> The district court carefully reviewed the details of each contract and advertisement proffered by [petitioners] as evidence of discrimination, and concluded that the standard was not a facade for viewpoint discrimination. We find no error in the district

court's findings that the noncommercial contracts were effective prior to the adoption of the new standard and that advertisements accepted after the standard took effect were commercial in nature.

Finally, the court of appeals rejected petitioners' argument that the policy had been unconstitutionally applied to their advertisements. The court of appeals endorsed the district court's "finding that the advertisements were 'ideological communications' and the essential issue-oriented nature of the advertisements could not be changed to commercial advertisements by simply adding an offer to purchase a bumpersticker containing a political or religious message." Pet. App. 17a. The court of appeals noted that this Court has, on several occasions, "reject[ed] attempts to evade a regulation [of commercial speech] by appending a message aimed at transforming the speech" into noncommercial speech. *Id.* at 18a, citing *Valentine v. Chrestensen*, 316 U.S. 52 (1942), and *Board of Trustees v. Fox*, 492 U.S. 469 (1989). The court of appeals explained that if petitioners' argument on this point were to prevail, "the reasoning of *Lehman* [would be] hollow because a political advertising restriction could easily be avoided by tacking on a commercial offer to purchase the political message." Pet. App. 17a (italics added).

c. Judge Noonan dissented. Pet. App. 23a-27a. He explicitly conceded, however, that "the government as proprietor can limit a non-public forum to commercial speech" and that "the sides of buses in Phoenix are meant to be such a forum" (*id.* at 23a). Judge Noonan suggested that the basis of his dissent was "discriminatory application of the [standard]" by the City. *Ibid.* Judge Noonan did not, however, question the district court's findings, upheld by the majority, that the City applied the standard in a nondiscriminatory fashion. Rather, Judge Noonan emphasized that limiting the advertising space to

messages proposing a commercial transaction might have the effect of allowing, for example, "a power company [to] extol its product" while "[t]he Sierra Club, objecting to more dams, would be denied the forum." *Id.* at 26a. Judge Noonan suggested that in order to maintain neutrality, the City should "discriminate frankly as to content," specifying, for example, "that the buses will not carry commercial messages on hot topics" (*ibid.*).

The court of appeals rejected a suggestion of rehearing en banc, with no judge requesting a vote. Pet. App. 75a-76a.

## ARGUMENT

The court of appeals' decision is a straightforward, and plainly correct, application of well-established principles. The decision in no way conflicts with the decision of any other lower court. Further review is therefore unwarranted.

1. In *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974), this Court upheld a municipal policy that barred "political [and] public issue advertising" from "car cards" on public transit vehicles while accepting "commercial and service oriented advertising." *Id.* at 301, 299, 304 (plurality opinion). Justice Blackmun's opinion for four Justices explained the reasons for the municipal policy (*id.* at 304):

> Revenue earned from long-term commercial advertising could be jeopardized by a requirement that short-term candidacy or issue-oriented advertisements be displayed on car cards. Users would be subjected to the blare of political propaganda. There could be lurking doubts about favoritism, and sticky administrative problems might arise in parceling out limited space to eager politicians.

Although there was no opinion for the Court in *Lehman*, Justice Blackmun's plurality opinion has—as Justice White

noted in his opinion for the court of appeals (Pet. App. 8a-9a)—been treated as authoritative by this Court many times since *Lehman* was decided. See, *e.g.*, *International Society for Krishna Consciousness, Inc. v. Lee* [*ISKCON*], 505 U.S. 672, 678 (1992); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 390 n.6 (1992); *United States v. Kokinda*, 49 U.S. 720, 725 (1990) (plurality opinion); *Cornelius*, 473 U.S. at 801, 803-04, 806, 808-09; *Perry*, 460 U.S. at 47, 49 n.9; *United States Postal Service v. Council of Greenburgh Civic Associations*, 453 U.S. 114, 129, 130 n.6 (1981).

This case represents a straightforward application of the repeatedly-reaffirmed principles of *Lehman*. Like the municipality in *Lehman*, the City of Phoenix has consistently "limit[ed] access to the advertising spaces on city transit buses." *Cornelius*, 473 U.S. at 803, citing *Lehman*, 418 U.S. at 299-300. Petitioners explicitly concede this point. See Pet. 9 ("In managing the transit display spaces, the City of Phoenix has always objected to the presentation of political and religious messages thereon and prohibited such messages from being displayed.").[1] Like the municipality involved in *Lehman*, the City of Phoenix "is engaged in commerce" (418 U.S. at 303; see Pet. App. 34a) and leases advertising space "for the purpose of raising revenue" (*id.* at 2a). Phoenix has offered the same justifications for its policy that this Court accepted in *Lehman* and subsequent cases. See, *e.g.*, *Cornelius*, 473 U.S. at 809, citing *Lehman*, 418 U.S. at 304, and *Greer v. Spock*, 424 U.S. 828, 839 (1976)

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[1] The record shows that even before the adoption of the new policy, only about 1% of the total number of advertisements displayed on City buses was non-commercial (Affidavit of Neal Manske, E.R. 22, § 8). No candidate for political office had ever been allowed to use the exterior panels on City buses to advertise his or her campaign. *Id.* ¶ 9. ("E.R." refers to the excerpts of record filed with the court of appeals.)

("[A]voiding the appearance of political favoritism is a valid justification for limiting speech in a nonpublic forum"). Indeed, if anything, the Phoenix policy, which limits advertising to messages that "propose[] a commercial transaction," is even more clearly defined than the policy at issue in *Lehman*, which referred more vaguely to "[p]olitical advertising" (418 U.S. at 300 n.1).

Petitioners attempt to distinguish *Lehman* on the ground that it concerned advertising only on the inside, not on the outside, of rapid transit vehicles. See Pet. i, 13-14. Petitioners suggest that a concern for " 'captive audiences' " animated the Court in *Lehman* and that this concern is "[u]nwarranted" when advertising appears on the outside of vehicles. See Pet. 13. But as Justice White pointed out in his opinion for the court below, the facts of *Lehman* itself involved advertising on both the inside and the outside of public transit vehicles. Pet. App. 8a n.2, citing *Lehman*, 418 U.S. at 320 n.12 (Brennan, J., dissenting). Moreover, as the court of appeals also noted, the logic of the "captive audience" argument advanced by members of the Court in *Lehman* applies to advertising on the outside, not just the inside, of a vehicle (Pet. App. 8a, quoting *Lehman*, 418 U.S. at 307-08 (Douglas, J., concurring) (quoting *Packer Corp. v. Utah*, 285 U.S. 105, 110 (1932)); brackets in original):

> I agree with Mr. Justice Brandeis who . . . said that the visual message in streetcars is no different [from other forms of communication imposed on a captive audience], for "[a]dvertisements of this sort are constantly before the eyes of observers on the streets and in street cars to be seen without the exercise of choice or volition on their part. * * *"

See also *Lehman*, 418 U.S. at 302 (plurality opinion), quoting *Packer Corp.*, 285 U.S. at 110: "[V]iewers of billboards and streetcar signs ha[ve] no 'choice or voli-

tion' to observe such advertising and ha[ve] the message 'thrust upon them * * *.'" Indeed, Judge Noonan's *dissenting* opinion in the court of appeals eloquently described the seriousness of the captive audience concerns created by exterior advertising on public transit vehicles (Pet. App. 24a):

> Moving and grunting as they move, buses call attention to themselves. Stuck in traffic beside or behind a bus, the driver and passengers of a car cannot avoid taking in what confronts them. It is in their face. Similarly, pedestrians waiting for a light to turn cannot avert their eyes from what a waiting bus offers to view. The exterior panels are better than billboards in their abiilty to command consideration by those momentarily before them, and, unlike billboards, they move down central streets.

Petitioners' suggestion that *Lehman* can be distinguished because this case involves the outside of buses is, therefore, far too insubstantial to warrant review by this Court.

Unable to distinguish *Lehman*, petitioners argue that the Court should "reconsider[]" the holding of that case. Pet. 14; see Pet. i. But petitioners do not identify so much as a single passage in any of this Court's opinions that draws into question the holding of *Lehman* or the logic of the plurality opinion in that case. On the contrary, the Court's subsequent cases repeatedly cite the plurality opinion in *Lehman* as an exemplar of how "forum" analysis is to be applied. See, *e.g.*, *ISKCON*, 505 U.S. at 678; *Kokinda*, 497 U.S. at 725-26 (plurality opinion); *Cornelius*, 473 U.S. at 803-04; *Perry*, 460 U.S. at 49 n.9.

2. Petitioners' other contentions are also plainly mistaken.

a. Citing the plurality opinion in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 513 (1981)—written by Justice White—petitioners argue (Pet. 9-11) that the City's policy amounts to a "constitutional inversion" (*id.* at 11) because it allows commercial but not political advertisements on its buses. But in *Metromedia* the government was acting as a regulator, restricting the rights of private parties to use their property for speech. By contrast, here, as in *Lehman*, the government is acting as a proprietor, deciding what speech to allow on its own property. The *Metromedia* plurality explained this point, citing and distinguishing *Lehman*. 453 U.S. at 514 n.19; see Pet. App. 13a n.3.

"Where the government is acting as a proprietor, managing its internal operations, rather than acting as lawmaker with the power to regulate or license, its action will not be subjected to the heightened review to which its actions as lawmaker may be subject." *ISKCON*, 505 U.S. at 678; see also *Kokinda*, 497 U.S. at 725-26 (plurality opinion). In keeping with this principle, the Court, in cases dealing with government-owned property, has repeatedly upheld content-based restrictions that prohibit certain forms of political or high-value speech while allowing the property to be used for other speech. See *Cornelius*, 473 U.S. at 797-800, 808-12; *Perry*, 460 U.S. at 44, 47; *Greer v. Spock*, 424 U.S. at 831, 838 n.10.

b. Petitioners also renew their somewhat puzzling contention (Pet. 11-12) that the City's policy is invalid because the City's "admitted purpose [was] to exclude political and religious expression from its transit display spaces." Pet. 11. As the court of appeals explained, there is simply nothing improper about such a purpose, when the City is limiting access to a nonpublic forum and is doing so in a way that is reasonable and viewpoint-neutral. In such circumstances, the City is entitled to

adopt a policy of excluding speech on the basis of its content. See, *e.g.*, *Arkansas Educational Television Commission v. Forbes*, 118 S. Ct. 1633, 1643 (1998); *Cornelius*, 473 U.S. at 800.

c. Petitioners also quote at length Judge Noonan's argument that the City's policy has the effect of allowing some points of view to be expressed more readily than others. See Pet. 8, quoting Pet. App. 25a-26a. (For example, " '[t]he makers of a pesticide could celebrate their wares; champions of pesticide-free farms would be barred.' " *Ibid.*) The same argument was made by the dissent in *Lehman*. See 418 U.S. at 317 & n.10 (Brennan, J., dissenting). Petitioners suggest no reason why this argument should be more successful now than it was in *Lehman*, especially when *Lehman* has now become an even more solidly entrenched part of the First Amendment doctrine governing the regulation of speech on government property.

Nearly every permissible content-based restriction of speech—and many permissible content-neutral restrictions —will have viewpoint-differential effects like those identified by Judge Noonan. For example, a prohibition of obscene speech surely makes it more difficult to advocate sexual libertinism than to argue for sexual restraint. A law forbidding incitement, even if it fully complies with the standards of *Brandenburg v. Ohio*, 395 U.S. 444 (1969), will bear more harshly on radical critics of the government than on defenders of the status quo. Similarly, a content-neutral restriction like the ban on camping in a park upheld in *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1983), will make it more difficult to dramatize the plight of the homeless than to demonstrate for many other causes. Such viewpoint-differential *effects* are the inevitable consequence of many forms of regulation. They cannot possibly be sufficient

to invalidate a regulation of speech, so long as the government is not engaging in deliberate discrimination against a particular point of view.

d. Finally, petitioners, citing various messages that appeared in advertising spaces on City buses after the new policy was adopted, appear to suggest that the City enforced its policy in a discriminatory or arbitrary fashion. See Pet. 3-4. But the district court carefully reviewed each of these alleged instances of discriminatory enforcement, and found, in each case, that the City had followed its established policies. In each case, either the message in fact proposed a commercial transaction, or the City was fulfilling a contractual obligation it incurred before the new policy went into effect. See Pet. App. 66a-73a. As the district court found (*id.* at 66a):

> The City honored contracts into which it entered prior to the adoption of the new Policy and continued to run such advertisements until the contractual obligations were fulfilled. The City has not, however, accepted new advertisements that are not commercial in nature since the adoption of the new Policy on November 1, 1996.

The court of appeals explicitly affirmed these findings of the district court (Pet. App. 16a), and petitioners point to nothing in the record that would warrant questioning the concurrent factual findings of the two courts below. Indeed, the questions presented in the petition, fairly read, do not comprise any claim that the City administered its policy in a discriminatory or arbitrary way. See Pet. i. There is, accordingly, no basis for any claim that the City's policy—on its face or as applied—was anything other than viewpoint-neutral.

3. Contrary to petitioners' contention, the decision of the court of appeals does not conflict with the decisions

of any other lower court. In fact, the decisions of other courts of appeals—including several of those cited by petitioner—strongly support the ruling of the court of appeals in this case.

Petitioners assert, for example (Pet. 22-23), that the court of appeals' decision in this case conflicts with *New York Magazine v. Metropolitan Transportation Authority*, 136 F.3d 123 (2d Cir.), cert. denied, 119 S. Ct. 68 (1998). But the linchpin of the Second Circuit's decision in that case was that the Metropolitan Transportation Authority's standards "allow both commercial and political speech" (136 F.3d at 130). It was precisely for that reason that the Second Circuit found the space on the outside of the Authority's buses to be not a nonpublic forum but a "designated public forum" (*ibid.*) from which an advertisement with political overtones could not be excluded. See *id.* at 131-132. Far from ruling in a way that conflicts with the decision in this case, the Second Circuit left no doubt that it would uphold the policy that the City adopted here: "[d]isallowing political speech, and allowing commercial speech only" (*id.* at 130, citing *Lehman*, 418 U.S. at 304). See also *Lebron v. National Railroad Passenger Corp.*, 69 F.3d 650, on rehearing, 89 F.3d 39 (2d Cir. 1995), cert. denied, 517 U.S. 1188 (1996); *Paulsen v. County of Nassau*, 25 F.2d 65, 70 (2d Cir. 1991).

Petitioners also mistakenly rely (Pet. 23) on *Lebron v. WMATA*, 749 F.2d 893 (D.C. Cir. 1984), in which the court began its analysis by noting that there was "no[] * * * question" that the public transportation authority "ha[d] converted its subway stations into public fora by accepting * * * political advertising" (*id.* at 896)—in sharp contrast to the practice of the City of Phoenix in this case. The District of Columbia Circuit in *WMATA* then ruled that the authority had mistakenly excluded a

political advertisement on the ground that it was deceptive. But that court, like the Second Circuit, went out of its way to suggest explicitly that the authority might be able to avoid such difficulties in the future by "declining to accept political advertising in general." *Id.* at 899 (footnote omitted).

The same is true of *Christ's Bride Ministries, Inc. v. Southeastern Pennsylvania Transportation Authority* [*SEPTA*], 148 F.3d 242 (3d Cir. 1998), cert. denied, 119 S. Ct. 797 (1999), also cited by petitioners (Pet. 23 n.15). There, too, the court of appeals, in holding that SEPTA could not refuse an advertisement, explicitly distinguished *Lehman* on the ground that SEPTA, unlike the authority in *Lehman*—and unlike the City of Phoenix in this case—"has no longstanding practice of prohibiting [such] ads * * * SEPTA's past practice is, instead, to include such ads." 148 F.3d at 255. See also *id.* at 252 ("We conclude then, based on SEPTA's written policies, which specifically provide for the exclusion of only a very narrow category of ads * * * and based on SEPTA's practice of permitting virtually unlimited access to the forum, that SEPTA created a designated public forum."). See also *United Food & Commercial Workers Union, Local 1099 v. Southwest Ohio Regional Transit Authority* [*SORTA*], 163 F.3d 341, 346 & n.1, 355 (6th Cir. 1998) ("[I]n accepting a wide array of political and public-issue speech, SORTA has demonstrated its intent to designate its advertising space a public forum.").

In *AIDS Action Committee v. Massachusetts Bay Transportation Authority*, 42 F.3d 1 (1st Cir. 1994), another case with which petitioners claim a conflict (Pet. 19-20), the court concluded that a public transportation authority had violated its own policy of excluding advertisements containing sexual innuendo, thus giving rise to an unrebutted inference that the authority was in fact dis-

criminating on the basis of viewpoint. See 42 F.3d at 11-12. As we have noted, petitioners have no basis for claiming (and, in their questions presented, do not claim) that Phoenix engaged in impermissible viewpoint discrimination. The court in *AIDS Action Committee* explicitly declined to reach the question whether the policy involved in that case would be constitutional if evenhandedly applied. See *id.* at 9-11.

Finally, petitioners assert that the decision below conflicts with *U.S. Southwest Africa/Namibia Trade & Cultural Council v. United States*, 708 F.2d 760 (D.C. Cir. 1983), which disapproved a policy of excluding political advertisements from display cases at airports. But as petitioners concede (Pet. 17 n.12), the court's conclusion in that case was premised on the view that an airport is a public forum. See 708 F.2d at 764-67. Not only is this premise inconsistent with this Court's subsequent decision in *ISKCON*, *supra*, but even the court in *U.S. Southwest Africa* carefully distinguished *Lehman*, explaining that "the buses at issue in *Lehman*"—unlike, in that court's view, airports—were not "the type of wide-open public forum where the free flow of information is especially vital." 708 F.2d at 766.

There is, accordingly, no conflict among the courts of appeals on the issue presented by this case. On the contrary, the courts that have addressed similar issues have uniformly indicated that they would reach the same conclusion as the court below.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

RODERICK G. MCDOUGALL
City Attorney

MICHAEL D. HOUSE
Chief Counsel
Office of the City Attorney
200 West Washington Street
Phoenix, AZ 85003

DAVID A. STRAUSS *
Special Assistant City Attorney
1111 East 60th Street
Chicago, IL 60637
(773) 702-9601

DONALD O. LOEB
CAMPANA, VIEH, SHORE, OWENS & LOEB, P.C.
4422 N. Civic Center Plaza
Suite 101
Scottsdale, AZ 85251
(602) 707-5000

* Counsel of Record

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